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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1525

BYRON H. NAISBITT, Executor of the Estate of CAROL NAISBITT, Deceased; BYRON H. NAISBITT, As Guardian Ad Litem of CORTNEY NAISBITT, LAURA W. SWORD, Administratrix of the Estate of SHERRY MICHELLE ANSLEY, Deceased; ORREN W. WALKER JR.: and ORREN W. WALKER, JR., Administrator of the Estate of STANLEY O. WALKER, Deceased

Petitioners,

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United

States Court of Appeals for the Tenth Circuit rendered in these proceedings on January 2, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, is reported at 611 F. 2d 1350 (10th Cir. 1980), a copy appears in Appendix A pp. A1-A14. The opinion of the United States District Court for the District of Utah, Northern Division, is reported a 469 F.Supp. 421 (N.D. Utah 1979), a copy of which is attached as Appendix B. pp. A15-A19.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on January 2, 1980. This petition for certiorari was filed less than 90 days from the date of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 11.

QUESTION PRESENTED

Petitioners, Byron H. Naisbitt, Laura W. Sword and Orren W. Walker, Jr. brought suit in the United States District Court for Utah under 28 U.S.C. § 2674 alleging negligence on behalf of the United States in failing to properly supervise enlisted personnel in the United States Air Force, William S. Pierre and Dale Andrews, persons under its control with known dangerous propensities and to prevent them from inflicting foreseeable harms.

1. Whether 28 U.S.C. § 2680(h) distinguishes between assaults and batteries committed by employees

of the United States and those committed by non-employees where both are proximately caused by the antecedent failure of the United States to supervise a person under its control with known dangerous propensities.

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ."

Title 28, United States Code, § 2680(h):

"The provisions of this chapter . . . shall not apply to . . .

(h) Any claim arising out of assault, battery . . ."

STATEMENT OF FACTS

The dismissal in the District Court was on a motion for summary judgment. The facts relevant to the issues presented by this petition were therefore uncontroverted. The facts presented to this Court, the District Court and the Tenth Circuit were drawn from the Amended Complaints.

Dale S. Pierre and Williams Andrews were both enlisted Airmen attached to the 1550th Unit of the Air Force at Hill Air Force Base in Ogden, Utah. Military and civilian command level authorities at Hill knew the following:

That Pierre and Andrews were held in great fear by their co-workers and considered capable of committing murder;

Their co-workers were advised never to remain or be caught alone in the building with Pierre or Andrews;

That Pierre was the prime suspect of the Ogden City Police Department and the Air Force Office of Special Investigations in a murder committed in Ogden, Utah during the Fall of 1973;

That Pierre had three pending criminal complaints charging him with automobile theft;

Andrews had been convicted of a felony prior to his enlistment in the Air Force;[1]

That Pierre and Andrews were both known to have violent and dangerous propensities;

That on three occasions Pierre's Sergeant had released him from duty and ordered him to report for psychological or psychiatric evaluation;

That each time Pierre failed to report for the evaluations and no effort was made to determine why he did not report;

That psychiatric evaluations would have shown both Pierre and Andrews to be psychopathic and capable of committing the heinous crimes which resulted in this action.

Though the information above was known to authities at Hill Air Force Base, no effort was made to determine the true nature and extent of Pierre and

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[1] The Armed Services of the United States are prevented by law from enlisting convicted felons. 10 U.S.C. § § 504, 8253.

Andrews' psychological problem and dangerous propensities. Further, no effort was made to restrict Pierre or Andrews to Hill Air Force Base to protect the public until such psychological evaluations could be made.

On April 22, 1974 Pierre and Andrews entered an Ogden, Utah business known as the Hi-Fi Shop carrying revolvers and liquid Drano. At the time, four of their victims were on the premises and the fifth entered shortly thereafter. All five persons were assaulted, threatened, physically and mentally abused in an inhuman fashion. Michelle Ansley and Carol Naisbitt were both raped and tortured. Cortney Naisbitt was froced to drink liquid Drano. Oren Walker, Jr. had a pen inserted and then kicked into his ear. Oren Walker, Jr. and Cortney Naisbitt survived. For these crimes, Pierre and Andrews have both been sentenced to death. (For a more gruesome description of what occurred see *State v. Pierre*, 572 P. 2d 1338 (Utah 1977), cert. denied 439 U.S. 883 (1978) a portion of which is attached as Appendix C pp. A20-A24.

On July 12, 1978 Amended Complaints in these five suits were filed in the United States District Court for the District of Utah, Central Division, asserting jurisdiction under 28 U.S.C. § 2674, alleging that the United States was negligent in failing to properly supervise persons under its control whom it knew or should have known possessed dangerous propensities. The petitioners sought approximately two million dollars in damages. The United States moved, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, to dismiss the consolidated actions for lack of jurisdiction.

The United States argued in support of its motion that these claims arose out of assaults and batteries and the court thus lacked jurisdiction under 28 U.S.C. § 2680(h) which exempts intentional torts from the Federal Tort Claims Act's general waiver of sovereign immunity. The district court granted the United States' motion holding that the allegations of negligence were "merely an alternative theory of liability". *Naisbitt v. United States*, 469 F. Supp. 421, 423 (N.D. Utah 1979); Appendix p. A18. The district court relied on what it considered to be the weight of modern authority citing *Collins v. United States*, 259 F. Supp. 363 (E.D. Pa. 1966), *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954), and *Pennington v. United States*, 406 F. Supp. 850 (E.D.N.Y. 1976).

A timely appeal was taken by the petitioners to the United States Court of Appeals for the Tenth Circuit and on January 2, 1980 that court affirmed the decision below. The Tenth Circuit based its decision on a presumed jurisdictional distinction between assaults committed subsequent to the negligence of the United States by employees and those committed by non-employees. The court reasoned that the government could be held liable when the eventual assault was committed by a non-employee but not when it was committed by an employee. The court stated "whether it is explicitely mentioned or not [in 28 U.S.C. § 2680(h)], effect is given to the employee distinction." 611 F. 2d at 1356, Appendix p. A11. For supporting authority the Tenth Circuit relied on the same cases cited by the district court; *viz. Collins, Panella* and *Pennington.*

The court stated its hoding in extremely broad terms:

"In any case in which the [government] employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributable to the government." 611 F. 2d at 1356, Appendix p. A14.

REASON FOR GRANTING THE WRIT

I

THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS

The Tenth Circuit's holding, that the petitioners in this case who were raped, murdered and tortured by off-duty servicemen whom the government knew to have dangerous propensities cannot recover for the government's negligence, directly conflicts with decisions from two other Circuits and its own prior opinion considering the same issue.

Considering almost identical facts the Third and Fifth Circuits have held that injured parties may sue the government for negligent failure to control an employee with known dangerous propensities to prevent that employee from inflicting foreseeable harms. The only Court of Appeals position in support of the Tenth Circuit is certain dicta from the Second Circuit.

In *Gibson v. United States*, 457 F. 2d 1391 (3rd Cir. 1972) a Job Corps enrollee who was a juvenile delinquent with a known addiction to narcotics assaulted

the plaintiff who was an instructor at the Job Corps Center. The district court granted the government's motion to dismiss under the provisions of 28 U.S.C. § 2680(h) holding that the claim arose out of an assault and battery.

The Third Circuit reversed holding that whether the claim was based upon assault and battery, and thus, barred by § 2680(h), or on the antecedent negligence of the government was a simple question of tort law. That is, the court held that if the subsequent assaults were foreseeable they were "*not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injury.*" 457 F. 2d. at 1395. (Emphasis in original.) The tort asserted thus was one of negligence and not barred by § 2680(h). Foreseeability was properly alleged in the instant case.

The Third Circuit also considered the employee/non-employee distinction advocated by the United States (and found persuasive by the Tenth Circuit below). The Third Circut found the employee/non-employee distinction persuasive in *exactly* the opposite fashion from the Tenth Circuit. The court held "[i]n the case *sub judice*, the duty to control the conduct of the trainees is even stronger since they were allegedly employees of the United States at the time and definitely under its control." 457 F. 2d at 1394.[2]

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[2] **The Tenth Circuit attempts to distinguish Gibson saying "[l]iability was disallowed and there was specific mention of the fact that the assailant was not an employee, that he was a third person." 611 F. 2d at 1355 fn. 4, Appendix p. A12. Given the language of Gibson quoted above, and the Third Circuit's direct finding that "[the assailant] was a Job Corps enrollee**

In *Gibson* the Third Circuit discussed the earlier case of *Collins v. United States*, 259 F. Supp. 363 (E.D.Pa. 1966) relied on by the courts below. The court gave *Collins* short shrift confining it to its facts and noting that the only basis for the alleged government knowledge of the assailants dangerous propensities in *Collins* was the very assault for which the action was brought. In the instant case, as in *Gibson I*, the allegations of governmental knowledge and duty to control are substantial and predate the assaults. Thus, the decision in *Gibson I* is diametrically opposed to the decision reached by the Tenth Circuit below. Further, the Tenth Circuit's reliance on *Collins* is ill-founded when one notes that the Eastern District of Pennsylvania is within the Third Circuit.[3]

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[2] **Continued**

employed and housed by the United States . . . .", 457 F.2d at 1393, it is difficult to understand this distinction. The district court even admitted that **Gibson** squarely contradicted its holding. 469 F. Supp. at 423; Appendix p. A-17.

The petitioners submit that the Tenth Circuit has confused the opinion in **Gibson v. United States**, 457 F. 2d 1391 (3rd Cir. 1972), with the Third Circuit's subsequent opinion on appeal following remand. **Gibson v. United States**, 567 F. 2d 1237 (3rd Cir. 1977) cert. denied 436 U.S. 925 (1978). (Referred to as **Gibson II.**) After the district court decided **Gibson** on remand this Court issued its decision in **United States v. Orleans**, 425 U.S. 807 (1976). In light of **Orleans**, the Third Circuit held in **Gibson II** that the managing authority of the Job Corps Center with the responsibility for supervising the trainees, was an independent contractor and thus the United States could not be held liable. The holding in **Gibson II** does nothing to undermine the clear holding in **Gibson I** that the United States may be held liable for its negligent failure to control persons with known dangerous propensities.

[3] The District Court for the Eastern District of Pennsylvania recently decided **Bryson v. United States**, 463 F. Supp. 908 (E.D.Pa. 1978) following **Gibson** and directly contrary to **Collins** and the Tenth Circuit below.

In *Underwood v. United States*, 356 F. 2d 92 (5th Cir. 1966) the plaintiff alleged that the Government had negligenty released a mentally ill airman from a hospital allowing him to return to duty where he gained access to a pistol and killed his wife. After trial the district court found that the actions of the medical officers in releasing the assailant were not negligent and not a causal connection of the subsequent death. The Fifth Circuit reversed and remanded holding that negligence and proximate cause had been proven at trial.

The court held *inter alia* that the government could not raise 28 U.S.C. § 2680(h) on remand. The court relied on *Muniz v. United States*, 305 F. 2d 285 (2d Cir. 1962) aff'd *sub nom United States v. Muniz*, 374 U.S. 150 (1963). *Muniz* in turn relied entirely on *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954). The Fifth Circuit interpreted *Muniz* and *Panella* as holding that governmental employment status of the assailant was irrelevant when the complaint alleged an antecedent negligent failure to control. The holding in *Underwood* is thus directly contrary to the holding in the instant case.

One year earlier the Fifth Circuit had considered an analogous fact situation in *United States v. Shively*, 345 F. 2d 294 (5th Cir. 1965) cert. denied 382 U.S. 883 (1965). In *Shively*, the court held that the negligent issuance of a firearm to an Army Sergeant in violation of regulations was not the proximate cause of the plaintiff's injury. The court held *inter alia* that the claim would also have been barred by 28 U.S.C. § 2680(h)

as one arising out of assault and battery. 345 F. 2d at 297. In *Underwood*, one year later and with Chief Judge Tuttle sitting in both cases, the Fifth Circuit repudiated its statement in *Shvely* concerning § 2680(h). Careful reading of *Shively* and *Underwood* shows that the *correct* distinction between the cases was the allegation of foreseeability of harm. In *Shively*, the allegation was missing and the court held that the tort law of Georgia would not recognize a duty in the government absent such an allegation. In *Underwood* and the instant case such allegations of foreseeability are present.[4]

The Fifth Circuit's position has remained constant since its decision in *Fair v. United States*, 234 F. 2d 288 (5th Cir. 1956). In *Fair*, an Air Force Captain had threatened to kill a woman and these threats were known to military authorities. The captain was ordered to report to a hospital for a psychiatric examination and the woman was promised that she would be notified before the captain was released. Following a cursory psychiatric examination the captain was released without warning the woman. Upon release he killed her and two hospital security guards. The district court dismissed the claim based on 28 U.S.C. § 2680(a) finding that the actions of the Government had been "discretionary". The Fifth Circuit reversed and remanded based on this Court's decision in *Indian Towing Company v. United States*, 350 U.S. 61 (1955). No attention whatsoever was paid to the governmental employ-

[4] It is indicative of the split in the Circuits that the courts below relied upon **Pennington v. United States**, 406 F. Supp. 850 (E.D.N.Y. 1976), a District Court case in the Second Circuit proporting to interpret two cases from the Fifth Circuit.

ment status though § 2680(h) was an issue effecting subject matter jurisdiction. Thus, the court found liability even though the assailant was employed by the government as a member of the Armed Forces. This holding directly conflicts with the Tenth Circuit.[5]

The Tenth Circuit's own position on liability for negligent failure to control is not consistent. In *Sanchez v. United States*, 506 F. 2d 702 (10th Cir. 1974), citing *Fair* with approval, the court held "if one has charge of a person who has dangerous propensities he must exercise reasonable care to control the third person in order to protect the public." 506 F. 2d at 705. The Tenth Circuit thus joined the Third and Fifth Circuits recognizing liability for negligent failure to control irrespective of the employee/non-employee distinction it attempts to introduce in the instant case. As show above, the purported distinction conflicts with the other Circuits which have directly considered the issue.

Though petitioners cited and relied on *Sanchez* in both their principal and reply briefs to the Tenth Circuit and the United States attempted to rebut *Sanchez* in its brief, the court below found no need to even men-

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[5] The Tenth Circuit attempts to distinguish **Fair** as being decided on hospital-patient grounds. 611 F. 2d at 1355 fn. 3, Appendix p. A12. This attempted distinction is illusory when one recognizes the procedural posture in which the instant case reaches this Court. The Fifth Circuit used the hospital-patient relationship to establish a knowledge of the assailant's dangerous propensities and a duty and opportunity to control his actions. In the instant case, the petitioners alleged a similar knowledge, duty and opportunity of control. Since this case was decided on summary judgment these allegations must be taken as true and the Tenth Circuit's perceived distinction vanishes.

tion its prior conflicting decision. It is especially interesting to note that Judge Doyle wrote the opinion in both *Sanchez* and the instant case.[6]

The principal case supporting the Tenth Circuit is *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954). Panella was an inmate at a Federal drug rehabilitation institution and was assaulted by another inmate. Panella alleged that the government was negligent in failing to control the other inmates. The government was granted summary judgment on § 2680(h) as a "claim arising out of assault". The Second Circuit reversed, holding that § 2680(h) did not bar the negligence action against the government.

The court apparently reasoned that if the intentional assault was committed by a government employee the victim claim against the government would be on a *respondeat superior* theory and barred by § 2680(h). In which case, the negligence allegations were merely an attempt to find an alternative form of remedy not barred. Since there was no possible *respondeat superior* liability from a non-employee the court reasoned that the negigence action was the sole remedy and thus not barred by § 2680(h). (See Point II, *infra*, for discussion of the policy questions involved.)

This Court considered an issue related to *Panella* in *United States v. Muniz*, 374 U.S. 150 (1960). One of the petitioners in *Muniz* (the case was a consolida-

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[6] No petition for rehearing was filed in this case because the Practitioners Guide published by the Tenth Circuit indicates that such an action is a futile waste of time.

tion of two actions) was a prisoner in a Federal correctional institution who, when a fight broke out, was beaten by other inmates. Muniz alleged that the government was negligent in failing to prevent the assaults. The government argued that there was either an expressed or implied exemption under the Federal Tort Claims Act for prisoner lawsuits. The body of this Court's opinion in *Muniz* is concerned with this point but at the end, the Court cites § 2680(h) for the basic proposition that the government is not liable for the intentional torts of its employees, 374 U.S. at 163. Nowhere in *Muniz* did this Court consider the liability of the government for the negligence of its employees which results in subsequent attacks by other government employees.

One of the grounds for granting certiorari, Supreme Court Rule 19, is that there be a direct split in the Circuits. On the issue in the present case, the position taken by the Tenth Circuit below directly contradicts that taken in almost identical cases by the Third and Fifth Circuits. The holding below also contradicts an earlier Tenth Circuit opinion and is supported only by a 1956 case in the Second Circuit. The petitioners submit that this Court should grant certiorari in the instant case to resolve the conflict between the Circuits.

II

THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE POLICY OF THE FEDERAL TORT CLAIMS ACT

The purpose of the Federal Tort Claims Act, 28

U.S.C. § § 1346, 2671 *et seq.*, is to provide a process of recovery for tortious actions of the government. § 2674 provides "that the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." In contrast to the general rule of strict construction concerning waivers of governmental immunity, this Court has repeatedly held that the Federal Tort Claims Act is to be liberally and equitably construed to further the Congressional intent. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951) and *United States v. Aetna Casualty & Surety Co.*, 388 U.S. 366 (1949). In *United States v. Muniz*, 374 U.S. 150, 159 (1955), this Court went even further and held that "the government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their empoyees. The Federal Tort Claims Act extends to novel and unprecedented forms of liability as well." (Citations omitted.)

With these considerations in mind, the petitioners submit that the decision of the Tenth Circuit below conflicts with the policies inherent in the Federal Tort Claims Act as interpreted by this Court. The mandate of the Federal Tort Claims Act is that the government will be liable for its negligence under the same circumstances as would a private individual. The law in the various jurisdictions of the United States is that a private individual, who knows of a third persons dangerous propensities and has the duty and opportunity to control that person, is liable for his negligent failure to

control when the third person inflicts foreseeable injuries. *Tarasoff v. Regents of the University of California,* 529 P.2d 553 (Cal. 1974); *Sanchez v. United States,* 506 F. 2d 702 (10th Cir. 1974); *Fair v. United States,* 234 F.2d 288 (5th Cir. 1956). See also, *Restatement, Second, Torts* § 319.

In actions alleging a negligent breech of the duty to control, no discussion of the employment relationship between the assailant and the party with the duty to control is proper. The Tenth Circuit's employee/non-employee distinction attempts to introduce into the Federal Tort Claims Act an issue unknown to the private tort law duty of control. The Act clearly requires only that the private duty standard be applied. Thus, the only questions which should be involved are the tort law issues of knowledge of dangerous propensities, duty and opportunity of control, proximate causation and injury.

The problem in the § 2680(h) cases discussed in Point I has been an inability to separate cases where liability was arrested on a "duty of control" theory and the liability of *respondeat superior.* The Tenth Circuit made this confusion evident in its attempt to justify its holding below:

> "In any case in which the employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributabe to the government. This may well be because of the doctrine of *respondeat superior* or because the employee is closely related to the government. It would appear to be the proximity

> of the employee which gives the government's role its intentional quaity." 611 F. 2d at 1356; Appendix p. A14.

In a *respondeat superior* case, for example in the instant case if the petitioners were suing the government for the assaults of Pierre and Andrews, employment relationships would be important. However, when, as in the instant case, the action is for a negligent breech of a duty to control a third person with known dangerous propensities the employment status of the eventual assailant should be irrelevant. What is relevant is a knowledge of dangerous propensities and a duty of control.

This Court has held that courts should not act as "self-constituted guardian[s] of the treasury [and] import immunity back into a statute designed to limit it." *Indian Towing Company v. United States*, 350 U.S. 61, 69 (1955). Petitioners submit that the casuistries of the employee/non-employee distinction is an attempt to import immunity back into the statute contrary to the policies of Congress. This Court should grant certiorari pursuant to Supreme Court Rule 19 to resolve the conflict between the opinion of the Tenth Circuit and the policies of the Federal Tort Claims Act.

III

THE ISSUE IS ONE OF IMPORTANCE REQUIRING THIS COURT'S DECISION

The policy question posed by this petition is what the responsibility of the United States should be under

the Federal Tort Claims Act when it knows that employees under its control have dangerous propensities and will foreseeably inflict injury on the public. The Tenth Circuit has held that the government is *never* liable for its negligent failure to supervise its employees to prevent their foreseeable intentional torts. Every other Circuit which has directly considered this issue has held to the contrary (See Point I, *supra*) and the holding of the Tenth Circuit is contrary to the policy of Congress in enacting the Federal Tort Claims Act. (See Point II, *supra*).

There are approximately two million one hundred thousand men and women serving in the Armed Forces of the United States. In addition, the Department of Defense hires approximately nine hundred and eighty thousand civilian workers. The other agencies of the various branches of the government account for another one million nine hundred thousand employees. *1979 Statistical Abstract of the United States.* This represents approximately five percent of all people employed in the United States.

The Tenth Circuit's interpretation of § 2680(h) gives the government carte blanche to ignore the dangerous propensities for harmful and intentional acts by persons under its control. As in the instant case, servicemen with known psychopathic homicidal tendencies will be allowed to roam free across the country unrestrained because the government is insulated from all resulting liability. Should the other result apply, as in the Third and Fifth Circuits, the magnitude of the potential governmental liability is obvious.

With such divergent positions being taken by the Circuits, and the dimensions of the consequences of different rulings, the petitioners submit that the issue in the present case is of such importance that it requires resolution by this Court and, under Supreme Court Rule 19, a writ of certiorari should be issued.

IV

THE CASE WAS NOT DECIDED BELOW ON ADEQUATE INDEPENDENT STATE GROUNDS

In the next to last paragraph of the Tenth Circuit's opinion, 611 F. 2d at 1356, Appendix p. A14, the court purports to find that the egregious and heinous nature of the crimes committed by Pierre and Andrews removes any negligence on the part of the government whatsoever. Apparently this holding is introduced as an independent adequate state law grounds for decision. In that respect, it is both procedurally and substantively wrong.

The question of proximate causation is an issue of tort law and was plead by the petitioners. Since the case was dismissed on a motion for summary judgment it must be taken as true. In addition, the issue has never been contested by the government and was not briefed in this context before the Tenth Circuit.

Moreover, the opinion of the Tenth Circuit on this matter is clearly wrong. The magnitude of horror of the intervening intentional tort is irrelevant to the issue of

proximate cause so long as the harm was foreseeable. See *Gibson v. United States*, 457 F. 2d 1391 (3rd Cir. 1972). See generally *Restatement, Torts, Second* § § 448, 449.

Finally, the instant case is not like *Martinez et al. v. California et al.*, ... U.S. ..... (Jan. 15, 1980). In *Martinez*, a California statute granted specific immunity for decisions of parole boards in releasing individuals who subsequently injure others. While upholding the statute against various constitutional challenges this Court did nothing to alter the general tort law regarding duty of control.

CONCLUSION

This Court should grant certiorari to resolve the conflict among the Circuits, to enforce the policy of Congress, to decide an important issue of policy and law and to prevent manifest injustice. The supposed employee/non-employee distinction has been floating around without resolution long enough. This Court should finally resolve the governments responsibility for controlling its employees with known dangerous propensities. The Tenth Circuit states "we are not unmindful or unsympathetic of the innocent plight of the plaintiffs." 611 F.2d at 1356 Appendix p. A14. The petitioners submit that the Congress of the United States, this Court and other courts have also not been blind to the plight of the petitioners and that the Federal Tort Claims Act was passed to provide the petitioners, and others in the same situation, with exactly the remedy sought here.

Respectfully submitted this 31st day of March, 1980.

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Attorneys for the Petitioners

AFFIDAVIT OF SERVICE

I, C. C. Patterson, a member of the bar of this Court, hereby enter my appearance as counsel of Record for the Petitioners and certify that I affected service on all counsel required under the Rules to be served with copies of this brief by mailing three copies, postage prepaid to Barbara Allen Babcock, Assistant Attorney General, Department of Justice, Washington, D.C. 20530; Robert E. Kopp and Phyllis Jackson Lee, Attorneys, Civil Division, Department of Justice, Washington ,D.C. 20530; Ronald L. Rencher, United States Attorney, U.S. Courthouse, 351 South Main, Salt Lake City, Utah 84103 and, Wade H. McCree, Solicitor General, Department of Justice, Washington, D.C. 20530.

APPENDIX A

United States Court of Appeals
Tenth Circuit

Nos. 79-1237, 79-1238, 79-1239,
79-1240, 79-1241

BYRON H. NAISBITT, Executor of the Estate of CAROL NAISBITT, Deceased; BYRON H. NAISBITT, As Guardian Ad Litem of CORTNEY NAISBITT, LAURA W. SWORD, Administratrix of the Estate of SHERRY MICHELLE ANSLEY, Deceased; ORREN W. WALKER, JR.; and ORREN W. WALKER, JR., Administrator of the Estate of STANLEY O. WALKER, Deceased.

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA

Defendant-Appellee.

Appeal from the United States District Court for the District of Utah, Central Division
(D.C. Nos. NC-78-0032, NC-78-0033, NC-78-0034, NC-78-0035, NC-78-0036)

Submitted on the briefs.

Before McWILLIAMS, DOYLE and LOGAN, Circuit Judges

DOYLE, Circuit Judge.

This action was brought by personal representatives of a number of persons who were victims of crimes which were committed by two airmen, Dale S. Pierre and William Andrews, who were assigned to duty at Hill Air Force Base near Ogden, Utah. The case allegedly arose under 28 U.S.C. §§ 1346 and 2671 *et seq.* There are five different lawsuits which have been consolidated for trial and for appeal.

The incidents here occurred on April 22, 1974, when two off-duty airmen entered a privately-owned retail store in Ogden, Utah, and committed a variety of atrocious acts including assaults, rapes, batteries and murders against the plaintiffs and the plaintiffs' decedents. Five persons were shot and three were killed.

The theory of plaintiffs' cases is that the United States was guilty of actionable negligence in failing to supervise and curtail the two airmen in question in that it was reasonably foreseeable that they would, unless restrained, perpetrate serious injuries. The United States moved to dismiss the actions claiming lack of subject matter jurisdiction under the Federal Tort Claims Act (§ 2680(h)), which excepts the government's waiver of immunity where the liability claim arises from assault and battery.

A further legal argument of the government is that under 28 U.S.C. § 2674, there must have been a legal duty running from the government to the person injured in order to render the government liable in the same manner and to the same extent as a private individual under like circumstances.

Plaintiffs amended their complaint so as to include § 1346(b) as a part of its jurisdictional basis. This section merely says that subject to Chapter 171 of the title, the district court has exclusive jurisdiction of civil actions in claims against the United States for money damages or injury to property or personal injury or death caused by the negligence of any employee of the government while acting within the scope of his office or employment under circumstances where the United States or a private person would be liable to the claimant in accordance with the laws of the place where the act or omission occurred.

The district court granted the defendant's motion to dismiss. This was on the ground that the claim actually arose from assault and battery and was therefore barred by 28 U.S.C. § 2680(h), which is the immunity exception. This provides that the waiver of immunity shall not apply to "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

THE ISSUES

The first question to be considered is whether the above-described deaths and injuries which resulted from batteries and which are presented on the theory of negligence of the government in failing to protect the public from the viciousness of servicemen can be maintained under the Federal Tort Claims Act notwithstanding that intentional torts are within the immunity retained in § 2680(h).

A second question arises only if we hold that there existed a duty on the part of the United States to protect the persons who were killed from the injuries which were suffered. This remaining question would be whether Utah recognizes a cause of action in negligence where criminal acts of third persons intervened.

THE TRIAL COURT'S DECISION

The trial court rested its judgment of dismissal on the principle that a distinction is to be drawn between assaults committed by government employees and assaults which were committed by non-government employees. Section 2680(h), the court said, has been construed to apply and to bar suits against the United States which were based on intentional wrongs committed by employees notwithstanding that the alleged liability is said by the plaintiff to rest on the negligence of government officials charged with the duty of supervision or control of the employees who committed the assault. The court cited Pennington v. United States, 406 F. Supp. 850 (E.D.N.Y. 1976), and Panella v. United States, 216 F.2d 622 (2d Cir. 1954). The courts take a different view as to the applicability of § 2680(h) when the intentional wrongs are committed by non-government employees where there has existed a governmental duty to supervise and control. The court cited Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), *aff'd* 374 U.S. 150 (1963).

The court noted that although the plaintiffs' claims sounded in negligence,[1] they were barred because their

[1] In which immunity is waived in the Tort Claims Act.

true nature and character was that of intentional torts. Negligence, the court continued, was invoked merely to avoid § 2680(h), *supra*. The court was reluctant to recognize this negligence theory as a matter of policy because to do so would destroy the effectiveness of § 2680(h) where intentional torts were committed by employees of the government. Under this analysis, sovereign immunity is waived notwithstanding § 2680 (h), *supra*, in situations such as where federal prison employees negligently fail to supervise or control prisoners or hospital employees fail to supervise patients as a result of which an assault and battery or other intentional tort is perpetrated by the uncontrolled patient or prisoner.

The trial court embraced the employee as opposed to the non-employee distinction. It stated:

> The sole basis for imposing liability on the government is the fact that two government employees committed *intentional* wrongs against plaintiffs and their decedents. Thus, this is unlike the case in which the government is sued for failure to adequately supervise non-employees. There the sole basis for liability is the negligence of the government officials charged with the duty of supervision. In such a case, negligence is not merely an alternative theory of liability; it is the only basis upon which the government can be held responsible. The intentional wrong cannot itself be the basis of liability because that act was not committed by a government official. Here, in contrast, government liability is possible only because government employees committed the intentional act. Thus, although plaintiffs' complaint is drawn in terms of negligence,

> the essence of the cause of action is an assault and battery committed by two individuals who were government employees at the time of the wrongful acts. The claim arises *only* because of the *intentional wrong* committed by employees of the sovereign and is, therefore, a claim "arising out of" an assault and battery and is within the scope of §2680(h). Plaintiff's negligence theory is, in this case, merely an alternate theory of liability. Panella v .United States, 216 F.2d 622 (2d Cir. 1954); Pennington v. United States, 406 F. Supp. 850 (E.D.N.Y. 1976); Collins v. United States, 259 F. Supp. 363 (E.D.Pa. 1966). (Emphasis in original)

DOES 28 U.S.C. § 2680(h) BAR THE PRESENT ACTION?

We are constrained to hold that it does. The leading case on the applicability of 28 U.S.C. §2680(h) is Panella v. United States, 216 F.2d 622 (2d Cir. 1954). The author of the opinion in *Panella* was Judge John Marshall Harlan. The district court for the Eastern District of New York had granted the government's motion for summary judgment. It had done so on the ground that the action involved a claim arising out of assault which was held to have been barred under § 2680(h) of the Tort Claims Act. The trial court had determined that § 2680(h) embraced assaults by persons not employed by the government as well as those committed by government employees. The part of the district court's decision holding that the non-waiver of immunity contained in § 2680(h) applied to non-government employees was reversed and the court in effect held that in the non-employee case § 2680(h) did not

preclude recovery. The plaintiff in this case had been sentenced for a drug offense, but upon his election to undertake treatment he was sent to the Public Health Service Hospital in Lexington, Kentucky, a government institution. While there he was assaulted by another inmate. He sued the United States under the Federal Tort Claims Act contending that the assault was caused by the negligence of employees of the United States in failing to provide adequate guards and by neglecting to properly supervise those confined in the institution. The Second Circuit holding was that a claim sounding in negligence could be prosecuted against the United States where, as in *Panella*, the assailant was not an employee of the government. The court said that if § 2680(h) was to be read literally, it would apply to assaults committed by persons other than government employees, but that such a reading was out of harmony with the rest of the act. "For in the present case the only basis of liability against the Government is the negligence of its employees, not their deliberate torts, * * * It is therefore important to distinguish cases in which it was sought to hold the Government liable on a negligence theory for assaults committed by *government employees.*" 216 F.2d at 624.

The distinction made by the Second Circuit in *Panella* as to the § 2680(h) exclusion in employee cases and the non-applicability of § 2680 to non-employee cases has been adopted in most of the subsequent decisions. *See, for example,* Pennington v. United States, *supra*, and Collins v. United States, 259 F. Supp. 363 (E.D.Pa. 1966).

In Pennington v. United States, *supra*, a widow brought an action for injuries inflicted on her husband by a deputy United States marshal, who shot him. The marshal at the time of the shooting had been intoxicated. The negligence allegation was the government's allowing the assailant to carry a gun. The court relied on *Panella, supra*, and said that "It is by now well settled that where negligent performance of duties owed by the government to certain individuals makes possible assaults on those individuals by *non-employees* of the government, § 2680(h) will not bar a negligence claim against the government * * * On the other hand, it seems that where the claim against the government is based on alleged inadequate training or negligent supervision of an *on-duty government employee*, which allows or causes the employee to commit an assault, the language of § 2680(h) is applicable and the claim is barred. Panella v. United States, *supra;* Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972); Collins v. United States, 259 F. Supp. 363 (E.D.Pa. 1966)." 406 F. Supp. at 851. The court then pronounced its ruling that § 2680(h) disallowed suits against the government for inadequate training or negligent supervision of an off-duty government employee.

Some of the decisions denying liability tend to give emphasis to the legal causation issue rather than the question of employment relationship. *See, for example*, United States v. Shively, 345 F.2d 294 (5th Cir. 1695), *cert. denied*, 382 U.S. 883 (1965).

A contemporaneous case from the Fifth Circuit, Underwood v. United States, 356 F.2d 92 (5th Cir.

1956), added another element, that of the off-duty factor in a case in which the assailant was a serviceman who killed his wife soon after he had been released from a psychiatric clinic. The suit sought to hold the government responsible because of premature release. The court determined that the government was liable. It emphasized the patient-hospital relationship and used the off-duty element in order to avoid the employee impediment. The district court for the Eastern District of New York in *Pennington, supra,* criticized this reasoning.[2]

In Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), *aff'd,* 374 U.S. 150 (1963), the plaintiff alleged that while he was confined in a federal prison, he was

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[2] This criticism analyzes the lack of logic in distinguishing between an on-duty and an off-duty government employee in the context of the §2680(h) immunity provision:

> We believe that the opinion of the Court in **Shively** states the correct rule. We assume, as we must, the validity of the holdings that an action against the government for negligence in permitting an assault by a non-employee is not one "arising out of assault", but that an action for permitting an assault by an on-duty employee is one "arising out of assault." And we note that the distinction which we might draw between a non-employee and an off-duty employee is not entirely a satisfactory one. But less satisfactory is the distinction plaintiff asks us to draw between on-duty and off-duty employees. We cannot believe Congress meant to bar suits arising out of assaults only by on-duty employees when it exempted claims "arising out of assault" from those covered by the Tort Claims Act. The government's alleged duty not to hire defendant Miller was in no way dependent upon his on-duty or off-duty status. The duties of the government to train Mr. Miller likewise did not vary with his arrival and departure from his place of employment. The alleged obligation to prevent Mr. Miller's access to firearms applied whether or not he was at any given moment actually working for the United States. In short, the government is charged with negligence in

set upon and beaten by 12 fellow inmates. The complaint alleged that the government's negligence consisted of failure to maintain proper guards or segregation of dangerous persons. The Second Circuit reversed the district court's order of dismissal and held that there was a claim stated. In regard to immunity the court said:

> Nor does this case fall within the exemption of 28 U.S.C. §2680(h), barring claims "arising out of assault." That exception applies only to assaults by government agents, not to assaults by third parties which the government negligently fails to prevent. Panella v. United States, 216 F.2d 622 (2d Cir. 1954).

305 F.2d at 287.

The United States relies, in addition, on the case of United States v. Shively, 345 F.2d 294 (5th Cir. 1965), *cert. denied*, 382 U.S. 883 (1965). There the plaintiff sued under the Tort Claims Act alleging negligence of the United States in allowing her husband, a sergeant in the military, to have access to government weapons in violation of regulations and despite knowledge of his unstable condition and dangerous propensities. The *Shively* court said that the government's

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[2] **Continued**

> **hiring Mr. Miller, and in allowing him to be armed. Any duty of the government to screen prospective employees involves actions with no connection to the employee's work schedule or duty status. Thus while it may be significant in a respondent superior case to determine the duty status of the tortfeasor, it is not significant to do so when negligence in hiring or training is the gist of the complaint.**

406 F. Supp. at 852.

negligence in issuing the gun was not the cause of the plaintiff's injuries since it was not reasonably foreseeable that he would use the weapon to assault his former wife. On the immunity question the court said:

> From what has already been noted of the facts of this case we also conclude that appellee's claim here is a claim "arising out of assault", which is, in those words, specifically excepted from recovery under the Federal Tort Claims Act, 28 U.S.C. §2680(h). It is not necessary to the ruling here, and we do not determine whether every assault intervening between a show of negligence of the United States and injury to third parties is barred under the Federal Tort Claims Act by this exclusionary language.

345 F.2d at 297.

Shively thus went off on the basis that the statute, 28 U.S.C. § 2680(h), precluded the recovery because the injury arose out of an assault and that there was not sufficient showing of negligence based upon foreseeability of harm.

Some of the cases such as *Shively* do not squarely address the issue of applicability of § 2680(h) where the assailant was an employee. Most of the cases, however, including the leading opinion of Judge Harlan in *Panella*, hold that the non-waiver of immunity contained in § 2680(h) is applicable where the intentional tort is committed by an employee. Thus, whether it is explicitly mentioned or not, effect is given to the employee distinction. It is believed that it stems from the proposition that where the employee has committed a tortious intentional act, even though it is not with the

approval of his employer, the government, nevertheless, he is so closely connected with the government that the intentional act is imputed to the government. Since the government has waived liability only in negligence cases and has retained its immunity in intentional tort cases in accordance with § 2680(h), an attempt to establish liability on a negligence basis is indeed an effort to circumvent the retention of immunity provided in § 2680(h).

Plaintiff here maintains that where the suit is in negligence the court should not go behind it and make a distinction as to whether the tortfeasor is an employee. He cites Fair v. United States, 234 F.2d 288 (5th Cir. 1956),[3] Gibson v. United States, 457 F.2d 1391 (3rd Cir. 1972),[4] and Hicks v. United States, 511 F.2d 407

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[3] In **Fair**, the tortfeasor was in the service. He was an Air Force captain with known homicidal tendencies. Also, he was a patient in a government psychiatric hospital. He shot and killed a student nurse whom he had previously threatened. The action against the government claimed that he had been released from the hospital with knowledge of his propensities. The determination was that the government could not escape liability under the exercise of discretion exemption contained in §2680(a). This is a case which departs from the employee standard. The only factual difference is that the assailant was, in addition to being an employee, a patient of a mental hospital. The hospital had full knowledge of his propensities. It was this latter status which was stressed in holding that the hospital was liable. Because of this factual difference, the case is not directly supportive of the plaintiff's position here. Because of the hospital-patient relationship and the duty to protect members of the assailant's family and the public generally from his dangerous propensities, it presents a strong case for liability.

[4] In **Gibson**, the assailant was not an employee, he was a Job Corps trainee who committed an assault on an employee of the Job Corps, an instructor. The theory of the plaintiff-employee was that the government had notice that the assailant was an addict and dangerous. Liability was disallowed and there was specific mention of the fact that the assailant was not an employee, that he was a third person.

(D.C. Cir. 1975).[5]

Although *Fair* upheld a claim, it did not address the employee-non-employee issues. In *Gibson*, the assailant was not an employee. *Hicks* was a hospital patient case in which it was alleged that he was negligently released, whereby St. Elizabeths Hospital, a government agent, rendered the United States legally responsible. It does not appear in the facts that the patient was also an employee of the government. None of these decisions lend support to the plaintiffs in the present case.

In summary: The strong thread which runs through most of these cases is that which recognizes the immunity of the government where the assailant is an employee of the government. This is applied regardless of whether the employee is on duty. The district court here considered the fact that Pierre and Andrews were employees to be a compelling reason for holding that § 2680(h), *supra*, applied. The rationale for this appears to be that where the intervening assailant is an employee, the tort with which the government is charged is in fact as well as law an intentional one subject to

[5] In **Hicks**, the plaintiffs were coadministratrices of the estate of one Corinne Morgan. It is alleged that St. Elizabeths Hospital, an agent of the United States, was negligent, as a result of which the decedent was killed by her husband, who had been a patient at St. Elizabeths Hospital. He shot her after he had allegedly been given liberty as a result of the negligence of St. Elizabeths. The assailant husband was mentally incompetent with the knowledge, of course, of St. Elizabeths. The court there said that the hospital owed a duty to the public in carrying out its responsibilities. The assault was directly attributable to his insane condition, and it was held that the hospital was directly responsible for his release and for the act which was caused by his drinking together with his mental condition.

the § 2680(h) provision. There is a dearth of authority which allow an action to be prosecuted against the government under the Tort Claims Act where the intervening assailant was an employee. In any case in which the employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributable to the government. This may well be because of the doctrine of *respondeat superior* or because the employee is closely related to the government. It would appear to be the proximity of the employee which gives the government's role its intentional quality.

Finally, the particular facts of this case lead to the conclusion that the tort which is the basis of the lawsuit was intentional and subject to § 2680(h) because it was, as a matter of law, an intervening force of such great magnitude that it rendered the negligence of the government in failing to control the assailants insignificant in comparison. The character of the act is so predominantly intentional that the negligence as a causal force is virtually nonexistent.

We are not unmindful or unsympathetic to the innocent plight of plaintiffs. However, to hold the United States government legally responsible for the act in view of the immunity from liability based on intentional conduct and considering its lack of moral, legal or factual contribution would not only be invalid, it would constitute gross injustice.

Having weighed the relevant factors, we hold that the trial court's decision was correct. The judgment of the district court is therefore affirmed.

APPENDIX B

BYRON NAISBITT, Executor of the Estate of Carol Naisbitt, Deceased, Plaintiff,

v.

The UNITED STATES of America, Defendant.

No. NC 78-0032

United States District Court, D. Utah, N. D.

Jan. 2, 1979

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

ALDON J. ANDERSON, Chief Judge.

This action arises out of a series of rapes and murders committed by off-duty United States servicemen while stationed at Hill Air Force Base. Plaintiffs are suing the United States in tort for alleged negligence in failing to adequately evaluate and supervise the servicemen involved. The government has filed a motion to dismiss based on lack of subject matter jurisdiction contending that:

1) plaintiffs' complaint fails to allege a basis for federal court jurisdiction;

2) plaintiffs' complaint is barred by 28 U.S.C. § 2680(h) which excepts from the Federal Tort Claims Act claims arising out of an assault or battery;

3) plaintiffs' claim does not meet the requirements of 28 U.S.C. § 2674 because it does not set forth a duty owed by the government that would be owed "in the same manner and to the same extent [by] a private individual under like circumstances."

Because the court finds that the action is barred by 28 U.S.C. § 2680(h) it is not necessary to rule on the government's other contentions.

Section 2680(h) sets forth exceptions to the general waiver of sovereign immunity contained in the Federal Tort Claims Act. Among other things, the statute prohibits suits against the United States on any claim arising out of the commission of an intentional tort, including assault and battery. The application of this section has not always been consistent (compare *Gibson v. United States* 457 F.2d 1391 (3d Cir. 1972) with *Collins v. United States*, 259 F.Supp. 363 (E.D. Pa. 1966)), but it seems fairly well settled that § 2680(h) does not apply to intentional torts committed by those who are not government employees but who are under government supervision, but does apply to intentional wrongs committed by those who are employed by the government. *Pennington v. United States*, 406 F.Supp. 850 (EDNY 1976); *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954). The question presented for decision here is whether or not, even though the plaintiffs' complaint is drawn in terms of negligence, the action still arises out of an assault and battery so as to fall within the scope of § 2680(h). As stated in *Nichols v. United States*, 236 F.Supp. 260 (N.D. Miss. 1964):

> [T]he applicability of . . . 28 U.S.C. § 2680(h) cannot turn on the artistry of the pleader. The test is not the theory upon which the plaintiff elects to proceed or how artfully the pleadings may have been drawn. Rather, the decisive factor is whether, in substance and essence, the claim arises out of an assault and battery.

Id. at 263.

It is true that not all the courts faced with this question have agreed on the scope of the § 2680(h) exception. See *Gibson v. United States*, 457 F.2d 1391 (3rd Cir. 1972); *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966). However, the weight of authority and the better view supports the government's contention that the plaintiffs' claim is barred by sovereign immunity. The sole basis for imposing liability on the government is the fact that two government employees committed intentional wrongs against plaintiffs and their decedents. Thus, this is unlike the case in which the government is sued for failure to adequately supervise non-employees. There the sole basis for liability is the negligence of the government officials charged with the duty of supervision. In such a case, negligence is not merely an alternative theory of liability; it is the only basis upon which the government can be held responsible. The intentional wrong cannot itself be the basis of liability because that act was not committed by a government official. Here, in contrast, government liability is possible only because government employees committed the intentional act. Thus, although plaintiffs' complaint is drawn in terms of negligence, the essence of the cause of action is an assault and battery commit-

ted by two individuals who were government employees at the time of the wrongful acts. The claim arises *only* because of the *intentional wrong* committed by *employees* of the sovereign and is, therefore, a claim "arising out of" an assault and battery and is within the scope of § 2680(h). Plaintiffs' negligence theory is, in this case, merely an alternative theory of liability. *Panella v. United States, supra*; *Pennington v. United States, supra*; *Collins v. United States, supra.*

Waivers of sovereign immunity are to be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). To allow plaintiffs' claim would be to greatly expand the waiver of immunity provided for in the Federal Tort Claims Act. The legislative history of § 2680(h), meager though it is, indicates that Congress sought to protect the United States from suits resulting from the intentional torts of its employees. See *Panella v. United States, supra* at 625-26. However, if plaintiffs' theory were upheld the government would be subject to suit for its employees' intentional wrongs on the theory that the government had negligently failed to control the offending employee. Such a theory would greatly dilute, if not destroy, the protection afforded by § 2680.

The case of *Muniz v. United States*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963) is not to the contrary. There the Supreme Court addressed only the question of the right of a federal prisoner to sue under the Tort Claims Act. It did not rule on the scope of § 2680(h). However, in dicta, the Court indicated that

§ 2680(h) would provide a valid defense in a case such as this. *Id.* at 163, 83 S.Ct. 1850.

The plaintiffs contend that the issue of the court's jurisdiction cannot be resolved without a trial on the merits and cite the case of *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947). While the court agrees that, in the appropriate case, it has jurisdiction to examine the merits of an action to determine the existence of subject matter jurisdiction, the court does not find this to be an appropriate case. The commission of the assault and battery and the fact that the commission of that wrong gives rise to plaintiffs' complaint is undisputed. The applicability of § 2680(h) is a threshold question in a suit such as this and can be determined by the court as a matter of law. Accordingly,

IT IS HEREBY ORDERED that plaintiffs' complaint be dismissed with prejudice.

APPENDIX C

STATE of Utah, Plaintiff and Respondent,

v.

Dale S. PIERRE, Defendant and Appellant.

No. 13903

Supreme Court of Utah

Nov. 25, 1977

(Certain footnotes omitted.)

Affirmed and remanded.

Ellett, C. J., and Crockett, J., concurred and filed opinions.

Maughan, J., concurred in part and dissented in part and filed opinion.

WILKINS, Justice:

The Defendant Dale S. Pierre was charged with three counts of murder in the first degree (a capital offense) in violation of Utah Code Annotated, 1953, Section 76-5-202, as enacted 1973, for the murders of Carol Naisbitt ,Michelle Ansley, and Stanley Walker: additionally he was charged with two counts of aggravated robbery in violation of Utah Code Annotated, 1953, Section 76-6-302, as enacted 1973, for the robbery of Orren W. Walker, Jr. and Stanley Walker. The acts forming the bases of these crimes occurred at the Hi-Fi

Shop, a business selling stereo and allied equipment, located in Ogden, Weber County, Utah, on April 22, 1974 during the robbery thereof. All statutory references herein refer to Utah Code Annotated, 1953, as enacted in 1973, Title 76, Utah Criminal Code unless otherwise indicated.

The defendant was tried jointly with William Andrews and Keith Roberts (who were charged with the same five counts as defendant and who are the subjects of companion cases decided this date) before a jury in the District Court of Davis County, State of Utah, and the defendant was found guilty on all five counts on November 15, 1974 (the trial having commenced on October 15, 1974). On November 20, 1974, after a hearing to determine sentences on the murder convictions, this same jury returned a unanimous verdict of the death penalty against the defendant on each of the murder counts. The District Judge then on November 27, 1974, sentenced the defendant to death by shooting at the Utah State Prison on all counts of first degree murder, and he also sentenced the defendant to an indeterminate term of five years to life at said prison on the two counts of aggravated robbery.

The evidence at the guilt or innocence stage of the trial (herein "guilt phase") established that the defendant, Andrews, and Roberts were airmen stationed Hill Air Force Base, Utah. Stanley Walker, Michelle Ansley, Carol Naisbitt, Cortney Naisbitt (son of Carol Naisbitt), and Orren W. Walker, Jr. (father of Stanley Walker) were tied up, made to lie on the floor, and

forced to drink liquid Drano on the evening of April 22, 1974, in the basement of the Hi-Fi Shop in Ogden, Utah, by the defendant in company with Andrews, who aided the defendant by pouring the caustic substance into a plastic cup for accomplishment of these violent acts. The defendant and Andrews both had hand guns and defendant finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun, which caused the deaths, within a brief period of time during that April evening, of Stanley Walker, Michelle Ansley (who had also been raped by the defendant just before he shot her) and Carol Naisbitt. Cortney Naisbitt and Orren W. Walker, Jr., survived but obviously sustained injuries, with Cortney suffering particularly serious ones.

Evidence further established that Orren and Stanley Walker were robbed in an aggravated manner of personal property in their possession (equipment from the Hi-Fi Shop being taken from Stanley and a watch and wallet being taken from Orren) on April 22nd at the Hi-Fi Shop by the defendant, Andrews, and Roberts. The defendant and Andrews were identified inside of said shop during the robbery and Roberts was identified walking in front of it.

The evidence at this stage of the proceedings was extensive, there being thereat sixty-six witnesses and more than 300 exhibits of physical evidence. In addition to matters mentioned above, the evidence, in summary, established that Andrews had purchased a blue 1970 Chevrolet van in November, 1973, which was used

in the robbery of the Hi-Fi Shop in the evening in question; that Andrews had stated in February, 1974, that he would like to rob a hi-fi shop and would kill anyone who got in his way; the defendant saw in April, 1974 the movie "Magnum Force" in which someone was murdered by being forced to drink Drano; defendant and Andrews priced stereo items at the Hi-Fi Shop two days before the fatal day of April 22nd; defendant rented a storage unit on April 22, 1974, signing a lease agreement thereon which agreement was discovered in defendant's room after the crimes; the storage unit contained a bottle labeled "Drano" and a plastic cup as well as a large quantity of stereo equipment taken from the Hi-Fi Shop, and fingerprints of defendant and Andrews were on some of this equipment; in the afternoon of April 22nd, defendant and Andrews were identified in the blue Chevrolet van as it was at or near the Hi-Fi Shop and Roberts was driving said vehicle near the shop; wallets, purses, and other personal items of identification belonging to the victims were found next to defendant's barracks as well as Hi-Fi Shop labels in Andrews' room and in a garbage can in the latrine of defendant's barracks; and the .25 caliber pistol used to shoot some of the victims was owed by a roommate of Roberts, who had borrowed it from this roommate shortly before April 22nd.

Orren W. Walker, Jr., an eye witness victim to events inside the Hi-Fi Shop on that April 22nd also testified that Michelle, Cortney, and Stanley pled for their lives before the defendant and Andrews; and after shooting him (Orren), the defendant vehemently kicked

a ball point pen into one of his ears and attempted to strangle him with a cord.[5]

At the penalty or sentencing phase of the trial (herein "penalty phase") which took place before the same jury as heard and participated in the guilt phase, the defendant and Andrews were parties thereto but Roberts was not as he had not been convicted of a capital offense. Defendant did not give testimony at this latter phase though Andrews did.

The State presented as witnesses a psychiatrist, a clinical psychologist and a United States Air Force Lieutenant; and defendant called a Protestant Chaplain and a criminologist as witnesses.

Evidence about defendant adduced at this phase demonstrated that while in the Air Force, he failed to report to places of duty wrote two bad checks (for nominal amounts), and unlawfully took another's auto. Also, defendant's Commander initiated a separation action from the Air Force against him which was not consummated, on the basis that Pierre was "minimal productive, and a limited potential airman," though that same Commander recommended honorable discharge for him.

* * *

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[5] The record movingly establishes a heroic discipline by Orren Walker who, feigning death after the shooting, endured enormous physical and mental torment in silence and immobility. By doing so he was able to survive and relate the events that unfolded in horror before him.

Supreme Court, U. S.
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No. 79-1525

In the Supreme Court of the United States

OCTOBER TERM, 1979

BYRON H. NAISBITT, EXECUTOR OF THE ESTATE OF CAROL NAISBITT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether, in the circumstances of this case, the government may be held liable on a negligence theory under the Federal Tort Claims Act for failing to prevent an off-duty employee from committing an assault and battery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 611 F. 2d 1350. The opinion of the district court (Pet. App. A-15 to A-19) is reported at 469 F. Supp. 421.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1980. The petition for a writ of certiorari was filed on March 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of crimes committed by Dale S. Pierre and William Andrews, two off-duty airmen stationed at the Hill Air Force Base near Ogden, Utah. On April 22, 1974, Pierre and Andrews entered a privately owned retail store in Ogden and committed a variety of offenses, resulting in the death of three persons and serious injury to two others (Pet. App. A-2).

Petitioners, the victims who survived the attacks and the personal representatives of those who did not, filed the instant Federal Tort Claims Act suit against the United States in the United States District Court for the District of Utah. Petitioners alleged that the commanding officers at Hill Air Force Base knew that Pierre and Andrews were violent and capable of committing such crimes and that the officers were negligent in failing to have the men committed to a hospital for observation and treatment or to confine them to the base. Such negligence, petitioners argued, gives rise to liability under 28 U.S.C. 1346 and 2671 *et seq.* (Pet. App. A-2).

The district court granted the government's motion to dismiss the complaint on the ground that the claim is barred by 28 U.S.C. 2680(h), which provides that the

waiver of sovereign immunity in the Federal Tort Claims Act does not apply to any claim arising out of certain intentional torts, including assault or battery (Pet. App. A-15 to A-19).[1] The court of appeals affirmed, agreeing with the district court that an assault or battery committed by an off-duty government employee is an intentional tort for which government liability is barred by Section 2680(h).[2]

ARGUMENT

The holding of the court of appeals that the government is not liable under the Federal Tort Claims Act on the facts alleged in this case is plainly correct and,

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[1]As originally enacted, 28 U.S.C. (1952 ed.) 2680 provided that the Federal Tort Claims Act "shall not apply to—* * * (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights * * *."

This subsection was amended on March 16, 1974 (Pub. L. No. 93-253, Section 2, 88 Stat. 50), to permit claims against the United States arising out of assault, battery, and other intentional torts with regard to acts or omissions of federal investigative or law enforcement officers. This exception to the bar to liability is obviously inapplicable in the present case.

[2]The government also argued in its motion to dismiss the complaint in the district court that (1) the claims for liability arising from the failure of Air Force personnel to commit or confine Andrews and Pierre were based on the exercise or failure to exercise a discretionary function and were, therefore, barred by 28 U.S.C. 2680(a) (Memorandum in Support of Defendant's Motion to Dismiss at 7-9) and (2) the claims were barred by 28 U.S.C. 2674 because a "private individual under like circumstances" would not be liable under Utah law for the failure to restrain his employees (Memorandum, at 5-7). Because it found petitioners' claims to be barred by 28 U.S.C. 2680(h), the district court did not rule on these contentions (see Pet. App. A-16). Nevertheless, in the court of appeals, both petitioners and the government addressed the question whether a private individual under like circumstances would be liable in negligence under Utah law. See pages 3-4, *infra*. The court of appeals did not directly address this issue.

contrary to petitioners' assertions (Pet. 7-14), does not conflict with the decisions of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

1. It is undisputed that the attacks by Pierre and Andrews were not ordered by any agent of the federal government and occurred off government premises and outside of normal working hours. Thus, petitioners' claims, if based on the attacks themselves, would clearly be barred by 28 U.S.C. 1346(b). That section confers jurisdiction on the district courts of claims against the United States only if based on the negligent or wrongful act or omission of a government employee "while acting within the scope of his office or employment"—a phrase that, in the case of military personnel, "means acting in line of duty." 28 U.S.C. 2671.

Petitioners seek to avoid this result by bringing a claim sounding in negligence, alleging that personnel at Hill Air Force Base should have prevented Pierre and Andrews from committing these acts in their off-duty hours and off government premises by confining them to the base or committing them to a hospital for evaluation and treatment. Under established principles of tort law, however, a private employer is not liable for the conduct of his employees off the employer's premises and in nonduty hours. See *Restatement (Second) of Torts* § 317 (1965). Indeed, petitioners expressly conceded in the court of appeals that Utah law[3] "does not impose a duty upon

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[3]28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

Under 28 U.S.C. 1346(b), liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred."

[an] employer to control his employees while acting outside the scope of their employment" (Reply Br. 15).[4] This principle has particular force with respect to the federal government, which cannot reasonably be expected to account in money damages for the off-duty conduct of its several million civilian and military employees throughout the country. And this principle, we submit, is a complete answer to petitioners' argument for liability here.

2. Petitioners nevertheless contend that the United States may be sued for its failure to prevent Pierre and Andrews from committing the assaults and batteries involved in this case after their commanding officers allegedly knew of their dangerous propensities (Pet. 15-16, 17-18). This contention is difficult to square with petitioners' concession that, under Utah law, an employer has no duty to control the off-duty conduct of his employees. Petitioners also do not explain how their theory of recovery for injuries sustained as a result of the assaults and batteries can be reconciled with the language of 28 U.S.C. 2680(h), which bars any claim *arising out of* assault or battery, except those committed by federal law enforcement officers. Congress could have drafted a narrower exception, barring only claims *for* assault or battery—*i.e.*, claims sounding in intentional tort. See *Collins* v. *United States*, 259 F. Supp. 363 (E.D. Pa. 1966).[5] But Congress drafted the exception more broadly.

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[4]Petitioners also agreed (Reply Br. 15) with the government's position that applicable state law principles of *respondeat superior* are not expanded merely because the government is an employer in its military rather than civilian capacity. See Appellee Br. 9-11; *Williams* v. *United States*, 350 U.S. 857 (1955).

[5]In *Collins*, the complaint alleged that a postal employee, acting within the scope of his employment, struck the plaintiff and that the United States was negligent in hiring and retaining the employee when it knew or should have known he had "violent, vicious and

Here, petitioners' claims plainly "arise out of" an assault and battery, and 28 U.S.C. 2680(h) contains no exception for situations involving alleged antecedent negligence by other governmental personnel who might have prevented the assault or battery from occurring.[6]

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malicious propensities" (259 F. Supp. at 364). The court dismissed the complaint because the claim was one "arising out of" assault and battery within the meaning of 28 U.S.C. 2680(h).

[6]The reasons for barring all claims arising out of intentional torts are not difficult to identify. Mr. Justice Harlan, then writing for the United States Court of Appeals for the Second Circuit, mentioned several considerations underlying the bar to liability in 28 U.S.C. 2680(h) for assault, battery, and other intentional torts committed by government employees:

> [I]t may be that the § 2680(h) exceptions were prompted by the thought that high standards of public service would be promoted by government employees knowing that they could not engage in such lawless activities at government expense. Or it might be that these exceptions were considered as involving activities which practically, even though not legally, speaking are outside the scope of a government employee's proper official functions, or in any event unusually difficult for the Government to defend against.

Panella v. *United States*, 216 F. 2d 622, 625 (2d Cir. 1954). Moreover, as the court of appeals recognized (Pet. App. A-14), Congress reasonably could have concluded that an intentional tort such as assault or battery is of a sufficiently aggravated nature that, as a matter of federal law under the Tort Claims Act, it should be regarded as an intervening cause of any ensuing injury that relieves the government of liability on a theory that its negligence may also have contributed to the injury in some fashion. These considerations apply with all the more force where, as here, an assault or battery is committed by a government employee in his off-duty hours and off government premises.

Congress' decision in 1974 to permit claims arising out of assault or battery committed by federal investigative and law enforcement personnel (see note 1, *supra*) does not undercut the force of these policy considerations in other cases, such as that presented here. The work of law enforcement and investigative personnel is such that assault and battery will occasionally (albeit regrettably) occur in the

Moreover, petitioners' contention that the government may be sued on a negligence theory under the Federal Tort Claims Act for failing to prevent its employees from committing intentional torts has been uniformly rejected by the courts. In *United States* v. *Shively*, 345 F. 2d 294 (5th Cir. 1965), for example, suit was filed against the United States by a woman who was shot by her husband, an Army sergeant. Prior to the incident, plaintiff informed the commanding officer at Fort Benning that her husband had beaten her and threatened to kill her on more than one occasion. Shortly after this conversation, the husband obtained a gun from the arms room at Fort Benning (in violation of Army regulations), shot his wife, and killed himself. The Fifth Circuit held that the suit was a " 'claim arising out of assault', which is, in those words, specifically excepted from recovery under the Federal Tort Claims Act, 28 U.S.C. § 2680(h)" (345 F. 2d at 297).[7] Similarly, in *Pennington* v. *United States*, 406 F. Supp. 850 (E.D.N.Y. 1976), the court dismissed a Tort Claims Act suit, despite allegations that the government had prior knowledge that the assailant, an off-duty United States marshal, had violent tendencies and that the government was negligent in hiring and failing to supervise him properly. Accord, *Davidson* v. *Kane*, 337 F. Supp. 922

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execution of their official duties, whatever the precautions taken, and Congress has simply chosen to make the government liable when such episodes occur. This does not suggest that Congress would have intended to render the United States liable for intentional torts, such as those committed by Pierre and Andrews, that have no relation to the official duties of its employees.

[7]The court also ruled that the Army's negligence was not the proximate cause of plaintiff's injury (345 F. 2d at 296-297).

(E.D. Va. 1972); *Collins* v. *United States*, *supra*. See also *Restatement (Second) of Torts* § 314 (1965).[8]

3. There is a line of cases, distinct from the present case, in which the government has been held liable because of negligent operation of institutions, like mental hospitals or jails, which are expressly charged with the responsibility of supervising persons who pose a danger to society. When the negligent operation of such a facility by a private party leads to the injury of a third person, liability of the operator of the facility is well established in tort law. See *Restatement (Second) of Torts* § 319 (1965).[9] Although the government has no legally enforceable duty to the public to commit an individual to such an institution, if it chooses to do so and thereby voluntarily assumes the duty to protect the public from the individual, the government, like a private person, may be held liable for the negligent performance of that duty. Cf. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955); *Rogers* v. *United States*, 397 F. 2d 12, 14 (4th Cir. 1968).

Thus, the government has been held subject to suit where an inmate of a federal prison was assaulted by fellow prisoners as a result of the lax supervision of the guards. See *Muniz* v. *United States*, 305 F. 2d 285 (2d Cir. 1962) (en banc), aff'd, 374 U.S. 150 (1963); *Panella* v.

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[8]Section 314 provides:

> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

[9]Section 319 provides:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

United States, supra. In *Gibson* v. *United States*, 457 F. 2d 1391 (3d Cir. 1972), upon which petitioners rely (Pet. 7-9), the court applied this same principle with respect to injuries resulting from an attack by an enrollee of a federal Job Corps Center on an instructor at the Center.[10] The government has also been subjected to liability for injuries caused by dangerous persons whom it had negligently released from psychiatric institutions. See *Hicks* v. *United States*, 511 F. 2d 407 (D.C. Cir. 1975); *Underwood* v. *United States*, 356 F. 2d 92, 95, 98 (5th Cir. 1966); *Fair* v. *United States*, 234 F. 2d 288, 290 (5th Cir. 1956).

Because of the unique, affirmative responsibility the government has been held to have assumed for the safety of others in those situations, the decisions just cited have, in effect, fashioned an implied exception to the bar in 28 U.S.C. 2680(h) to claims arising out of assault or battery. There is no occasion here to consider the scope of this implied exception, support for which can, at all events, be found in the obligation owed to the public under tort law

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[10]In *Gibson*, the court, relying on Section 319 of the Restatement (457 F. 2d at 1395; see note 9, *supra*), held that the government could be found liable for negligent supervision at the Job Corps Center which led to the attack on the Job Corps instructor. The enrollees at the center were "dangerous, mentally ill young men who were known to be violent juvenile offenders and drug addicts" (457 F. 2d at 1394). The court, while acknowledging that a person ordinarily owes no duty of protection to others (*ibid.*), held that the government had "accepted the duty of caring for and controlling [the enrollees] knowing of their drug addiction and instability" and was, under these circumstances, "obliged to exercise reasonable care to prevent them from harming others" (*id.* at 1396).

In its subsequent opinion on appeal following remand, the Third Circuit affirmed the district court's ruling that the federal government did not have control over the day-to-day operations of the center and that, under this Court's decision in *United States* v. *Orleans*, 425 U.S. 807 (1976), the government therefore could not be held liable to the plaintiff for failing to provide adequate supervision. *Gibson* v. *United States*, 567 F. 2d 1237 (3d Cir. 1977).

generally by one who has "take[n] charge" of a person he knows or has reason to know is likely to cause bodily harm. *Restatement (Second) of Torts* § 319 (1965). In the present case, petitioners did not allege that the government had "take[n] charge" of Pierre and Andrews by committing them to an institution for psychiatric care or otherwise assuming an affirmative duty to control their conduct in significant respects for the protection of the public. As noted above, absent such allegations, courts have consistently held that the government is not liable in tort for assaults or batteries committed by the individual. See also *Sanchez* v. *United States*, 506 F. 2d 702 (10th Cir. 1974).[11]

Petitioners attempt to bring their claims within the reach of Section 319 of the *Restatement* (see note 9, *supra*) and the implied exception to the bar to liability under 28 U.S.C. 2680(h) by asserting (Pet. 15) that the government had the "duty and opportunity to control" Pierre and Andrews. Even assuming that the government had the authority and opportunity somehow to restrain or confine Pierre and Andrews, however, petitioners wholly fail to identify the source of a legally enforceable duty on the part of the government to do so. The only relationship of the government to the airmen in this case was that of an employer to his employees, which (as petitioners conceded below) gives rise to no duty on the employer's part to control off-duty conduct.[12]

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[11]In *Sanchez*, upon which petitioners also rely (Pet. 12-13, 16), the Tenth Circuit ruled that, for the government to be responsible for an assault and battery committed by a student attending a school operated by the Bureau of Indian Affairs, "it would have to appear that the school was similar to a jail or asylum." 506 F. 2d at 704.

[12]Because of petitioners' concession on this point, there is no need for the Court to consider whether the government could be sued for negligence under the Tort Claims Act on facts such as those presented

The mere ability of the government to direct its millions of military and civilian personnel in the performance of their official duties does not imply a right, much less a legal duty, pervasively to control their conduct off government premises and outside working hours. Such limited, job-related supervisory responsibility is vastly different from the sort of custody and control over all aspects of an institutionalized person's conduct that the government has been held to have assumed for the protection of others in the cases upon which petitioners rely.

Although the requirements of the military provide the opportunity for commanding officers to direct the conduct of personnel to a greater degree than is typically found in the civilian setting, this greater authority to control is conferred for reasons pertaining to the needs of the military, not, as in the cases upon which petitioners rely, for the protection of the public. No duty to protect the public may therefore be inferred from the existence of military command. In any event, as mentioned above (see note 4, *supra*), petitioners have correctly conceded that the fact that the government is an employer in its military capacity does not expand applicable principles of *respondeat superior*.[13]

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here if applicable state law did impose a duty on an employer to control the off-duty conduct of his employees. As we have pointed out, however, 28 U.S.C. 2680(h) states a flat prohibition against suits "arising out of" assault or battery. The scope of any implied exception to this bar, such as for situations involving institutionalized control of the assailant for the protection of society, would appear to be a question of federal law involving an interpretation of the Tort Claims Act itself, not a matter of state tort law. Cf. *United States* v. *Muniz*, 374 U.S. 150, 164-165 (1963).

[13]Moreover, without some compelling showing of legislative intent, absent here, we cannot read the Tort Claims Act as exposing the government to liability, depending on the vagaries of state law, on a theory that the government has an obligation to control the off-duty

4. Petitioners' claims are, in any event, barred by 28 U.S.C. 2680(a), which bars tort claims against the United States based on the exercise of or failure to exercise a discretionary function. Petitioners' assertion, in essence, is that commanding officers at Hill Air Force Base should have taken the two airmen into custody or confined them to the base because the officers knew or had reason to know that they were dangerous or had psychological problems—and, in Pierre's case, that he allegedly was the prime suspect in connection with a murder in Ogden and was named in three criminal complaints charging him with auto theft.

This Court has long recognized the broad prosecutorial discretion vested in officers of the government responsible for enforcing the criminal laws. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). Accordingly, the courts have consistently held that the exercise of prosecutorial discretion in declining to bring criminal charges against an individual or to warn the public of his potential for committing criminal acts is a discretionary function within the meaning of 28 U.S.C. 2680(a), depending, as it does, on difficult questions of fact, judgment, enforcement policy, and respect for the rights of the suspect or accused. See, *e.g.*, *Redmond* v. *United States*, 518 F. 2d 811, 816-817 (7th Cir. 1975); *Smith* v. *United States*, 375 F. 2d 243, 246-248 (5th Cir.), cert. denied, 389 U.S. 841 (1967); *United States* v. *Faneca*, 332 F. 2d 872 (5th Cir.

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conduct of its military personnel. Such a claim goes to the core of the government's relationship with its military personnel as regards screening, testing, command, and leave policies and the myriad practical difficulties involved in supervising off-base conduct of personnel stationed throughout the country. See *Feres* v. *United States*, 340 U.S. 135, 141-144 (1950); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-672 (1977).

1964), cert. denied, 380 U.S. 971 (1965); *Blessing* v. *United States*, 447 F. Supp. 1160, 1179 n.28 (E.D. Pa. 1978); *Brooks* v. *United States*, 152 F. Supp. 535 (S.D.N.Y. 1957); cf. *Dillon* v. *Antler Land Co.*, 341 F. Supp. 734, 743 (D. Mont. 1972), aff'd, 507 F. 2d 940 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975). In the present case, the decision by Air Force officers not to take Pierre into custody or confine him to the base in aid of state authorities' investigation of a murder in Ogden or criminal complaints charging Pierre with auto theft are similarly within the scope of the discretionary function exception.[14]

The decision whether the government should commit a person to an institution because of his alleged psychological problems or dangerous propensities is likewise a sensitive one, calling for the exercise of judgment, predictions about the person's future conduct, protection of the public, and appropriate respect for the individual's rights to remain free of restraint and of the stigma attaching to the mere fact of commitment for these reasons. *Vitek* v. *Jones*, No. 78-1155 (Mar. 25, 1980), slip op. 10-12; *Parham* v. *J. R.*, 442 U.S. 584, 600-601, 605-609 (1979); *Addington* v. *Texas*, 441 U.S. 418, 425-427 (1979); cf. *Martinez* v. *California*, No. 78-1268 (Jan. 15, 1980). The discretion of responsible government officials in determining whether to proceed with commitment in the interests of the individual or protection of society is

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[14]See also *Turner* v. *United States*, 248 U.S. 354, 357-358 (1919):

> The claimant contends that, by the general law, the Creek Nation is liable in damages for the action of the mob which resulted in the destruction of his property * * *.
>
> * * * The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace.

therefore akin to the exercise of prosecutorial discretion in the criminal context, and for similar reasons falls within the discretionary function exception in 28 U.S.C. 2680(a). See *Fahey* v. *United States*, 153 F. Supp. 878 (S.D.N.Y. 1957). Petitioners' claims alleging that the appropriate officials at Hill Air Force Base were negligent in not taking Pierre and Andrews into custody because of pending criminal investigations or for purposes of psychiatric evaluation and care are therefore barred for these reasons as well.

Finally, quite aside from the discretion necessarily vested in government officers with respect to law enforcement and commitment of individuals for observation and care, execution of the government's policy with respect to granting leave to its military personnel also involves a discretionary function within the meaning of 28 U.S.C. 2680(a). See note 13, *supra*.

5. We are aware of no court of appeals decision that the government may be held liable in negligence for its failure to commit or confine employees who other government employees are alleged to have had reason to believe might be dangerous. The decision below rejecting petitioners' novel theory of liability therefore does not create a conflict with any other decisions[15] and does not warrant review by this Court.

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[15]Petitioners' assertion of a conflict among the circuits is based on the Third Circuit's decision in *Gibson* v. *United States*, *supra*, and the Fifth Circuit's decisions in *Underwood* v. *United States*, *supra*, and *Fair* v. *United States*, *supra*. In all of these cases, however, the government had affirmatively assumed some manner of custody of the assailant going beyond a bare employer-employee relationship: in *Gibson*, by accepting the assailant as an enrollee at a Job Corps Center knowing that the enrollee might pose a threat; in the latter cases by committing the assailants to hospitals for examination because of threats they had made. These cases thus present no conflict with the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 79-1525

In the Supreme Court of the United States

OCTOBER TERM, 1979

BYRON H. NAISBITT, Executor of the Estate of CAROL NAISBITT, Deceased; BYRON H. NAISBITT, As Guardian Ad Litem of CORTNEY NAISBITT, LAURA W. SWORD, Administratrix of the Estate of SHERRY MICHELLE ANSLEY, Deceased; ORREN W. WALKER JR.; and ORREN W. WALKER, JR., Administrator of the Estate of STANLEY O. WALKER, Deceased

Petitioners,

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT

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No. 79-1525

In the Supreme Court of the United States

OCTOBER TERM, 1979

BYRON H. NAISBITT, Executor of the Estate of CAROL NAISBITT, Deceased; BYRON H. NAISBITT, As Guardian Ad Litem of CORTNEY NAISBITT, LAURA W. SWORD, Administratrix of the Estate of SHERRY MICHELLE ANSLEY, Deceased; ORREN W. WALKER JR.; and ORREN W. WALKER, JR., Administrator of the Estate of STANLEY O. WALKER, Deceased

Petitioners,

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

QUESTION PRESENTED

Whether 28 U.S.C. Section 2680(h) bars an action against the United States alleging antecedent negligent

failure of the United States to supervise a person under its control with known dangerous propensities from committing foreseeable harms where such harms are ultimately inflicted by intentional torts.

STATEMENT OF FACTS

The factual statement of the respondent is an exercise in understatement. The "variety of offenses" (Brief of Respondent p. 1 - hereinafter cited as "Resp. p. .....") committed by Airmen Pierre and Andrews included brutal rapes, murders, and tortures. For these heinous crimes Pierre and Andrews have been sentenced to death. (A petition for certiorari to review a denial of *habeas corpus* in that case, *Pierre v. Morris*, 607 P.2d 812 (Utah 1980), is also currently before this Court.)

The petitioners alleged in their amended complaints, and for the purposes of this petition to review a summary judgment such allegations must be taken as true, that military and civilian command level authorities knew the following:

> That Pierre and Andrews were held in great fear by their co-workers and considered capable of committing murder;
>
> Their co-workers were advised never to remain in or be caught alone in the building with Pierre or Andrews;
>
> That Pierre was the prime suspect of the Ogden City Police Department in the Air Force Office of Special Investigations in a murder committed in Ogden, Utah during the Fall of 1973;

That Pierre had three pending criminal complaints charging him with automobile theft;

Andrews had been convicted of a felony prior to his enlistment in the Air Force;

That Pierre and Andrews were both known to have violent and dangerous propensities;

That on three occasions Pierre's Sergeant had released him from duty and ordered him to report for physchological or psychiatric evaluation;

That each time Pierre failed to report for the evaluations and no effort was made to determine why he did not report;

That psychiatric evaluations would have shown both Pierre and Andrews to be psychopathic and capable of committing the heinous crimes which resulted in this action.

ARGUMENT

The petitioners *are not* arguing here that the murders, rapes, and tortures were "ordered by agents of the federal government." (Resp. p.3.) The petitioners are also *not* arguing that the government should be held liable on a theory of *respondeat superior.*[1] (Resp. pp.3,4.) Finally, the petitioners *are not* arguing that

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[1] **While the petitioners did agree below that a mere employer/employee relationship creates no duty on behalf of the employer to control the acts of the employee, such an admission is not determinative of this case. Petitioners' claim here is not based on a respondeat superior theory. Rather, the petitioners argue here for a duty in one who has control over third persons with known dangerous propensities. These two theories are entirely the other. No Utah case has considered the second theory but the general law of the country supports it. Tarasoff v. Regents of the University of California, 529 P.2d 552 (Cal. 1974).**

the crimes of Pierre and Andrews were not assaults and batteries. (Resp. p.5.)

What the petitioners contend here, and have contended all along, is that the government is responsible for its antecedent negligent failure to supervise persons under its control, whom it knew to have dangerous propensities, and to prevent them from inflicting foreseeable harms. Moreover, for the purposes of this petition, the petitioners contend that there is a direct conflict among the Circuits on this issue and that it is of sufficient importance for this Court to review this case.

I

THE CONFLICTS IN THE CIRCUITS IS NOT EXPLAINABLE BY FINDING AN "IMPLIED EXCEPTION"

Respondents' Brief in Opposition represents a dramatic change in its position. In both the District Court and the Tenth Circuit respondent contended, and the courts below agreed, that 28 U.S.C. Section 2680(h) was an absolute bar to suits, such as the instant case, where the ultimate injury was inflicted via intentional acts of government employees. Relying on dicta of this Court in *United States v. Muniz*, 374 U.S. 150 (1963), respondent and the lower courts found a presumed distinction in 28 U.S.C. Section 2680(h) between assaults committed by employees and those committed by non-employees.[2]

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[2] Respondents claim that 28 U.S.C. Section 2680(h) is a "flat prohibition against suits 'arising out of' assault or battery" (Resp. pp. 5, 10 fn. 12) is clearly incorrect. The injuries inflicted in **Muniz** were certainly assaults and batteries and this

Respondent now concedes that the government may be liable for its negligence in allowing assaults by employees. (Resp. p. 8.) *Gibson v. United States*, 457 F.2d 1391 (3rd Cir. 1972);[3] *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956). However, respondent attempts to distinguish these cases by finding an "implied exception" where the employee was in a jail, mental institution, or similar facility. (Resp. pp. 7-9.)

Such a distinction is unavailing for two reasons. First, the distinction is non-existent and second, assuming *arguendo* its existence, the petitioners here are well within its bounds as stated in respondents' Brief.

While it is true that *Underwood* and *Fair* both involved the negligent release of an employee from a

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Court found that 28 U.S.C. Section 2680(h) was not a bar to plaintiff's recovery. Such a "flat prohibition" would have also provided the rule of decision in the cases cited by respondent in its Brief, pages 7 through 9.

Moreover, respondents' intimation that 28 U.S.C. Section 2680(h) changes the general tort law rule of "intervening cause" for purposes of Tort Claims Act cases, by mandating that assaults and batteries are always to be regarded as relieving the government of liability for antecedent negligence, (Resp. p. 5 fn. 6) is not only unprecedented, but also erroneous. Such an argument, if it were correct, would have also prevented the plaintiffs in **Muniz** from recovering. Such an argument, superceding State Tort Law which furnish the rules for decision, 28 U.S.C. Section 1346(b), would also have been a final answer in the case cited by respondent in its Brief, pages 7 through 9.

[3] With all due respect to the Tenth Circuit (Pet. App. A-12 fn. 4) the petitioners again point out to this Court that the assailant in **Gibson** was an employee and the Third Circuit emphasized this point in finding liability, holding that this gave the government a greater duty and opportunity to control his actions. **Gibson**, 457 F.2d at 1393, 1394.

mental hospital, *Gibson* did not. The assailant there was a "dangerous, mentally ill [person] . . . known to be violent, juvenile offender and drug addict." *Gibson*, 457 F.2d at 1394.[4] Thus, the common thread in these cases is not the superficial identity of the prior location of the assailants. Rather, it is the knowledge of dangerous propensities. See *Restatement, Second, Torts*, Section 319 (1965).[5] It is interesting to note that not one of these cases mentions an "implied exception" as the basis of its decision.[6] The petitioners submit that they properly plead knowledge of Pierre and Andrews' dangerous propensities. pp. 3, 4 supra.

Even should such an "implied exception" be found to exist, the petitioners' pleadings are well within its scope. As proposed by respondent such an exception would require that the government had "assum[ed]

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[4] Given the clarity of the holding in **Gibson** — "[i]n the case **sub judice**, the duty to control the conduct of the trainees is even stronger since they were employees of the United States at the time and definitely under its control," 457 F.2d at 1394 — The petitioners are simply amazed at respondents' continuing reliance on **Collins v. United States**, 259 F.Supp. 363 (E.D. Pa. 1966). (Res.p.4.) It hardly seems possible that respondent does not recognize that the Eastern District of Pennsylvania is within the Third Circuit.

[5] Section 319 provides: "One who takes charge of a third person person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

[6] This knowledge of dangerousness is the proper factor distinguishing **Underwood** from the earlier Fifth Circuit case of **United States v. Shively**, 345 F.2d 294, (5th Cir. 1965) cert. denied 382 U.S. 883 (1965). In **Shively** there was no allegation of knowledge of dangerous propensities and thus no duty to control and no liability. In **Underwood** the allegation of knowledge of dangerous propensities was present and liability was found.

an affirmative duty to control their conduct in significant respects for the protection of the public." (Resp. p.9.) Having thus assumed such a duty the government would be then liable for its negligent performance. (Resp. p. 7.) Or, to paraphrase the position stated by the Tenth Circuit in *Sanchez v. United States*, 506 F.2d 702, 704 (10th Cir. 1974), "[t]o find that the [government] owed a duty to the public to protect its members from harm caused by the negligence of its [employees], it would be necessary to hold that the [government] had such control of the [employees] as to be able to control the [employees'] movements and actions at all times."[7]

The petitioners have consistently alleged and shown that the government had this kind of control over Pierre and Andrews. As the petitioners stated in their Brief to the Tenth Circuit, pp.19,20:

> Appellees' control over Pierre and Andrews is shown by the circumstances of military life. Persons from all over the country are brought to military bases, which supply all their needs and from which they are denied the right to leave without permission. Uniform Code of Military Justice ("U.C.M.J") Art. 15, 10 U.S.C. Section 815; Air Force Manual 110-3 Par. 10-13(b). It is within the inherent authority of a base commander to restrict an airman to the base to protect the public. Op.J.A.G.AF. 1952/24;

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[7] Respondent's quotation of **Sanchez** to the effect that liability would require finding that the school was similar to a jail or asylum (Resp. p. 9 fn. 11) is badly out of context. The jail or asylum mention is simply to provide an example of a situation in which the government would have total control of its employees and thus a duty to the public.

> A.F.M. 110-3 Par.15-5. Further, the base commander and lower officers have the power to restrict an accused airman to base for investigative purposes. Manual For Courts Martial, Par. 20(b), or as a non-judicial form of punishment. M.C.M. Par. 1316(b); U.C.M.J. Art 15, 10 U.S.C. Section 815; U.C.M.J. Art. 134, 10 US.C. Section 934.
>
> Additionally, the appellants contend that the appelee vountarily assumed a duty to control Pierre by ordering him to report for psychiatric evaluation and then not following up on these examinations or determining whether the evaluations were in fact performed. *Fair v. United States,* supra. Appellee also voluntarily assumed a duty to control Andrews because he was enlisted despite a previous felony conviction in violation of 10 U.S.C. Section 504 and 10 U.S.C. Section 8253.

Such allegations, and the allegations of knowledge of dangerous propensities on pages 3 and 4, supra, clearly bring the petitioners within the scope of any "implied exception".[8]

The petitioners have thus shown that there in fact exists a direct conflict between the opinion of the court below and other Circuits which have considered the issue. There is no "implied exception" which distinguishes this case from other cases, and, even if such an

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[8] It is difficult for the petitioners to comprehend respondents' claim that "petitioners wholly fail to identify a legally enforceable duty on the part of the government to [restrain Pierre and Andrews]." (Resp. p. 9.) The petitioners submit that at every stage of this case they have shown such a duty and a relationship between Pierre, Andrews and the Air Force far greater than merely employer/employee.

exception is found, the petitioners are included in its scope. Accordingly, this Court should issue a writ for certiorari to review this case.

II

THE ISSUE IS ONE OF IMPORTANCE REQUIRING THIS COURT'S DECISION

Respondent admits the importance of this issue when it states "the federal government . . . cannot reasonably be expected to account in money damages for the off-duty conduct of its several million civilian and military employees throughout the country." (Resp. p.4.) Though the issue is narrower than framed by that statement, the importance remains and is shown by the split in the Circuits.

This Court has held that courts should not act as "self constituted guardian[s] of the treasury [and] import immunity back into a statute designed to limit it." *Indian Towing Company v. United States,* 350 U.S. 61, 69 (1955). In *United States v. Muniz,* 374 U.S. 150, 159 (1955), the Court went even further and held that "the government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Federal Tort Claims Act extends to novel and unprecedented forms of liability as well." (Citations omitted.) The decision below represents a major departure from this Court's consistent position.

Is the government liable for its negligence allowing foreseeable harms from known dangerous persons

under its control? Only those committed by non-employees? Employees? Only in mental institutions? Jails? Always? Never? These are questions that only this Court can answer and the petitioners submit that this case deserves an answer.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 1st day of August, 1980.

C. C. PATTERSON

JOSEPH H. BOTTUM, III

BRUCE R. BAIRD